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No. 85-1524

In the

Supreme Court of the United States

October Term, 1986

HUBBARD BROADCASTING, INC.,

Petitioner,

vs.

SOUTHERN SATELLITE SYSTEMS, INC., and
TURNER BROADCASTING SYSTEM, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER IN OPPOSITION TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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PETITIONER'S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Petitioner responds to the Brief of the United States as follows:

I. Statutory Interpretation

Although there are numerous points in the Government's Brief which deserve comment, Petitioner will limit this response to the single key issue in the case: can Southern Satellite Systems, Inc. (Southern) qualify for the carrier exemption of sections III(a)(3) and III(b) when it is constantly selecting between a broadcast signal and a microwave signal *which differ in content*? To answer this question in the affirmative, the Government has read the word "selection" out of §III(a)(3) and created an artificial distinction between programs and commercials which ignores the reality of the television industry.

A. Section III(a)(3)

Section III(a)(3) grants an exemption from copyright liability to any communication carrier which has "no direct or indirect control over the content or selection" of the signal it retransmits. The Government's Brief argues that Southern does not control the *content* of the signal because it "does not choose between these signals on the basis of program content." Brief, page 13. Even assuming that the Government is correct that the word "content" in §III(a)(3) refers only to programming content, which Petitioner does not admit, the Brief does not address the question of why Southern's selection between two signals which differ in content is not "selection" as forbidden by the plain language of §III(a)(3). Nothing in §III(a)(3) refers to the motive of the carrier or exempts selections not based on "program content."

B. Section III(b)

All of §111, both the carrier exemption and the compulsory license as a whole, was designed to address the retransmission of broadcast signals. However, this design resulted not, as the Government suggests, from the technology which existed when the Copyright Act was passed in 1976 (Brief, pages 13-14), but from the fact that signals which are "broadcast" are signals which are receivable by the public at large. Thus, the issue here is not whether the microwave signal is a "primary transmission" (Brief, page 14)—Petitioner does not contend otherwise. Rather, the issue is whether the microwave signal is a "transmission made by a broadcast station" [§111(c)(1)] "made for reception by the public at large" [§111(b)] and thus qualifies for the compulsory license and exemption, or whether it is "limited to reception by particular members of the public" [§111(b)] and thus does not qualify.

The Eighth Circuit held that the microwave signal, although limited to reception by paying customers of Southern, did qualify for the compulsory license because Turner Broadcasting System, Inc. (Turner), the primary transmitter, desired that the signal be widely disseminated. The Government's Brief, pages 15 through 17, and in particular footnote 20, page 17, demonstrates the error of this interpretation. It shows that by focusing on the motives of the primary transmitter alone, the Eighth Circuit would permit Turner to transmit entirely different programming over the microwave wire from that broadcast over the air, Southern could "automatically" select the microwave signal to be transmitted to the satellite, and the retransmission would still qualify for the compulsory license and exemption of §111. In short, under the Eighth Circuit's opinion, Turner and Southern could collaborate in a "Home Box Office" type service over the microwave signal and still qualify for the compulsory license and carrier exemption.

Although essentially acknowledging the correctness of Petitioner's legal position, the Government nevertheless argues that the decision below should not be overturned because the substitution of commercials "does not implicate

the concerns that underlie section III(b)." Brief, page 15. In taking this position, the Solicitor General completely ignores the real world and the role of commercials in television broadcasting.

The government notes that §III(b) was intended to protect the interests of two groups—primary transmitters and copyright owners.[1] It concludes incorrectly, however, that the only copyright owners whose interests are implicated in the commercial substitution practice are the owners of the commercials being substituted. The Government fails to grasp the basic fact that in broadcasting, commercials are the means by which copyright owners of the *programming* are paid for exploitation of their works.

Commercials are the tickets to the performance. By substituting commercials, Turner and Southern are selling tickets to the same programming twice, once to the Atlanta market where Turner is licensed, and again to the cable market, where it has no license. The copyright owners being harmed by commercial substitution are obviously not the owners of the commercials, but the owners of the programs being sponsored by the substituted commercials. It is the economic returns from these works which are being diverted to the Turner/Southern enterprise without authority from or compensation to the copyright owners. Petitioner, as an exclusive licensee of the programs named in the Complaint, is a copyright owner by statute (17 U.S.C. §101). Petitioner has the exclusive right to sell the "tickets" to these programs in its licensed area. It is this right, the right "to market a valuable commodity," that the Government concedes was the focus of congressional concern in passing §III(b). Brief, page 17, footnote 19. The interests which §III(b) was intended to protect are thus precisely the interests being harmed by the practice of commercial substitution here.

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[1]The Government's statement at Brief, page 15, that the compulsory license was designed to protect only these two groups is incorrect. Section III, as a whole, of course, balances the interests of *three* groups, program suppliers, cable systems, and local broadcasters such as Petitioner into whose market area the distant signals are transmitted. Thus, the Government ignores the fact that the prohibitions against commercial substitution in Section III were intended specifically to protect the revenue base of local broadcasters rather than the primary transmitter.

II. IMPORTANCE OF THE CASE

With regard to the importance of this case, the Government's Brief in fact demonstrates three new reasons why this Court should grant certiorari:

1. The practice of commercial substitution, which was originally restricted to the Turner/Southern enterprise, has apparently now spread to another "superstation." Brief, page 10. Petitioner's concern that the entire industry will adopt the practice is thus already becoming a reality.

2. If the Eighth Circuit's decision is permitted to stand, the Government's Brief demonstrates that the practice of programming substitution is likely to follow.

3. Copyright is a right mandated by the Constitution itself. To the extent that the Copyright Act has been misinterpreted by a federal appellate court, as indicated by the Government's Brief, this Court should exercise its oversight power to remedy that error. This question of *copyright* law will remain, whatever the Federal Communications Commission decides to do concerning issues of *communications* policy. Furthermore, even the possibility of administrative rule-making in this area is highly speculative at this early stage in the process.

The full faith and credit of the United States is at stake here. The Government promised the Petitioner and all the local broadcasters in §111(c)(3) that there would be no commercial substitutions. True, §111(c)(3) speaks only of cable systems, but Congress had every right to expect that it had taken care of the other possibilities. The carriers were required to be passive, and the primary transmitter was given no compulsory license at all. Its signals were to be taken off the air without its consent and thus no license was necessary because it too would be passive. Congress' plan has been thwarted by the Turner/Southern enterprise and the Government's promise has been broken.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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